

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN SIMMONS,

Plaintiff,

vs.

MORGAN STANLEY SMITH
BARNEY, LLC,

Defendant.

Case No. 11cv2889-WQH (MDD)

**ORDER ON JOINT MOTION
FOR DETERMINATION OF
DISCOVERY DISPUTE:
GRANTING DEFENDANT'S
MOTION TO COMPEL
PRODUCTION OF PLAINTIFF'S
"PROJECT FLEMING"
DOCUMENT**

[ECF NO. 59]

Before the Court is the joint motion of the parties to determine a discovery dispute. The motion was filed February 25, 2013. The dispute centers upon a document referred to as the "Project Fleming" document which was produced in discovery by Plaintiff. The document was used in the deposition of Plaintiff and although initially stating that he prepared the document for himself, Plaintiff later stated that he thought it was privileged. Defendant challenges the assertion of privilege for this document and asserts that even if it was privileged, the privilege has been waived. Plaintiff asserts that the document is privileged and there has been no waiver. (ECF No. 59). The Court held a hearing on the motion on March 5, 2013. For the following reasons, Defendant's motion

1 is **GRANTED.**

2 Background

3 For a detailed exposition of the background facts of this litigation,
 4 see the Order issued by the Hon. William Q. Hayes on May 24, 2012,
 5 granting in part and denying in part Defendant's motion to compel
 6 arbitration. (ECF No. 37). As a consequence of that Order, the only
 7 claims pending before the Court at this time are Plaintiff's claims for
 8 employment discrimination in violation of 42 U.S.C. § 2000e and
 9 Cal.Govt.Code § 12940(a). Plaintiff asserts that he was discriminated
 10 against by Defendant in his employment due to his membership in the
 11 Church of Jesus Christ of Latter Day Saints.

12 Legal Standard

13 It is axiomatic that a party asserting the attorney-client privilege
 14 has the burden of establishing the existence of the attorney-client
 15 relationship and the privileged nature of the communication. *United*
 16 *States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). A court is to
 17 construe the privilege strictly, as it "impedes full and free discovery of
 18 the truth." *Id.* (citations omitted). The party asserting privilege bears
 19 the burden of satisfying this eight-part test:

20 (1) Where legal advice of any kind is sought (2) from a
 21 professional legal advisor in his capacity as such, (3) the
 22 communications relating to that purpose, (4) made in
 23 *Id.* (citation omitted).
 confidence (5) by the client, (6) are at his instance
 permanently protected (7) from disclosure by himself or by
 the legal adviser, (8) unless the protection be waived.

24 A disclosure of a communication protected by the attorney-client
 25 privilege in a federal proceeding does not constitute a waiver of the
 26 privilege if the disclosure is inadvertent; the holder of the privilege took
 27 reasonable steps to prevent disclosure; and the holder of the privilege
 28 took reasonable steps to rectify the error including following Federal

1 Rule of Civil Procedure 26(b)(5)(B). Fed.R.Ev. 502(b).

2 Discussion

3 The Project Fleming document consists of two handwritten pages.
4 It has been received and reviewed by the Court *in camera*. There is
5 nothing in the contents of the document that suggests that it was
6 prepared in connection with the receipt of legal advice.

7 The Project Fleming document was provided by Plaintiff to
8 Defendant on December 19, 2012, in response to discovery requests.
9 (ECF No. 59 at 5¹). On January 14, 2013, Plaintiff was deposed by
10 Defendant. (ECF No. 59-2). The document was presented to Plaintiff
11 who identified the handwriting as his own, said that he created it to
12 make note of his concerns and that he wrote it for himself. (*Id.* at 63).
13 For the next approximately six minutes, covering four pages of transcript
14 Plaintiff answered approximately 30 questions about the document. (*Id.*
15 at 64-67). Counsel for Defendant then re-asked Plaintiff whether he
16 created the document “solely for himself and not for any other purpose?”
17 This time, Plaintiff answered, “An attorney. I thought this was attorney-
18 client protected.” (*Id.* at 67-68). In follow-up questioning, Plaintiff
19 admitted that at the time he created the document he had not retained
20 an attorney and had not yet been terminated from employment. (*Id.* at
21 68-69). Counsel for Plaintiff refused to let Plaintiff answer any further
22 questions about the document including the critical foundational
23 question of whether he had prepared it at the request of an attorney.
24 (*Id.* at 69-70). In a letter to Defendant on February 7, 2013, Plaintiff
25 confirmed the assertion of privilege regarding this document and sought
26 its return. (ECF No. 59-3).

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28 ¹ The Court will use the page numbering supplied by ECF throughout rather than
the original page numbering of the original document.

1 In connection with the instant dispute, Plaintiff filed a declaration
 2 in which he stated that he met with his supervisor on or about February
 3 16, 2011, and was concerned that he might be terminated from
 4 employment. (ECF No. 59-4). Plaintiff claims that

5 “shortly after that meeting I contacted an attorney with
 6 whom I had a many year relationship to assist me with work
 7 place issues. I personally prepared [the Project Fleming]
 8 document to assist my attorney with these issues.”

9 (*Id.*). Plaintiff concedes that he delivered the document to his current
 10 attorneys without identifying it as potentially privileged. (*Id.*). Counsel
 11 for Plaintiff confirms that he was not aware that the document may be
 12 privileged until Plaintiff said so at his deposition. (ECF No. 59-3).

13 The Court finds that Plaintiff has not demonstrated that the
 14 Project Fleming document is privileged. Plaintiff does not state
 15 unequivocally that he prepared this document either while engaged with
 16 an attorney, regardless of whether or not the attorney was retained, or
 17 at the request of the attorney. The attorney is not identified nor the
 18 date of the contact between Plaintiff and the attorney. Considering that
 19 the privilege is to be strictly construed, this showing is insufficient.
 20 *United States v. Graf*, 610 F.3d at 1156.

21 Even if privileged, the Court finds that privilege was waived.
 22 Plaintiff, as the holder of the privilege, produced it to his counsel without
 23 taking any efforts to identify it as privileged. Plaintiff answered 30
 24 questions about the document before asserting privilege and, in finally
 25 asserting privilege, gave an answer completely contrary about the
 26 creation of the document than he gave prior to being asked in depth
 27 about the document. Finally, it was not until another approximately
 28 three weeks had passed before counsel for Plaintiff acted to protect the
 document under Fed.R.Civ.P. 26(b)(5)(B). Specifically, the Court finds
 that Plaintiff did not take reasonable steps to prevent disclosure nor to

1 rectify the error as required by Fed.R.Ev. 502(b).

2 Conclusion

3 For the foregoing reasons, Defendant's motion to compel production
4 of the "Project Fleming" document is **GRANTED**. Defendant may retain
5 and make use of the document consistent with law.

6 IT IS SO ORDERED.

7 DATED: March 8, 2013

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10 Hon. Mitchell D. Dembin
11 U.S. Magistrate Judge
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